STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-18

Date issued: November 12, 1991

Requested by: Richard Rayl, Director
Office of Management and Budget

- QUESTION PRESENTED -

Whether the director of the Central Personnel Division may constitutionally apply rules concerning personnel administration to classified employees of the State Board of Higher Education and the institutions of higher education.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the director of the Central Personnel Division may constitutionally apply rules concerning personnel administration to classified employees of the State Board of Higher Education and the institutions of Higher Education if the rules do not substantially impair or eliminate the Board's core functions.

- ANALYSIS -

In an earlier opinion I concluded that an appeal mechanism established in N.D.C.C. ch. 54-44.3 could be applied to classified employees of Higher Education without violating the constitutional provisions establishing the Board of Higher Education. 1986 N.D. Op. Att'y Gen. 16. This conclusion was based upon the fact that the employees involved were not faculty or officers of the higher education system. The employees in question here are also not faculty or officers of the higher education system.

N.D.C.C. ch. 54-44.3 now allows the Director of the Central Personnel Division to adopt rules:

a. Establishing and maintaining a classification plan.

b. Establishing and maintaining a compensation plan.

c. Promoting a consistent application of personnel policies.

d. Enhancing greater uniformity in matters relating to probationary periods, hours of work, leaves of absence, separations, transfers, disciplinary actions, grievance procedures, and performance management.

e. Ensuring fair treatment and compliance with equal employment opportunity and nondiscrimination laws.

N.D.C.C. ' 54-44.3-12(1). These rules apply to personnel in the classified service. Employees of the Board of Higher Education are only exempt from these rules if they are "[o]fficers [or] members of the teaching staff of universities and other institutions of higher education." N.D.C.C. ' 54-44.3-20(7). The question presented now is whether rules affecting subjects other than appeals of adverse employment decisions can be applied to the classified employees of the Board of Higher Education and the institutions of higher education.

The Board of Higher Education is a part of the Executive Branch of government in North Dakota. Leadbetter v. Rose, 467 N.W.2d 431 (N.D. 1991); Nord v. Guy, 141 N.W.2d 395 (N.D. 1966). As a body established by the constitution it is entitled to some degree of autonomy in the administration of the state's institutions of higher education. The Board of Higher Education was constitutionally created for the "control and administration" of those institutions. This means the Board manages and supervises the institutions. Nord v. Guy. It does not make it immune from the policies of the law established by the Legislature. N.D. Const. art. VIII, ' 6(1). The constitution also provides that:

> The said state board of higher education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. In furtherance of its powers, the state board of higher education shall have the power to delegate to its employees details of the administration of the institutions under its control. The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions.

N.D. Const. art. VIII, ' 6(6)(b) (Emphasis supplied.)

When it was created, the Board of Higher Education assumed the powers of the State Board of Administration. Nord v. Guy, 141 N.W.2d 402. The State Board of Administration was a creation of the Legislature and was subject to legislative control even to the extent that the powers and duties of the State Board of Administration could be totally eliminated by the Legislature. The separation of powers doctrine limits the Legislature's activities in areas affecting the Board of Higher Education. The separation of powers doctrine provides that the legislative power is in the house and the senate, the executive powers lie with the Governor and the Lieutenant Governor, and judicial power lies with the courts. This doctrine limits the Legislature's activities affecting the Board of Higher Education as it is a member of the

executive branch.

No North Dakota cases have addressed the issue of the Legislature limiting the scope of the Board of Higher Education's authority. The North Dakota Supreme Court has addressed the board's authority. See Sacchini v. Dickinson State College, 338 N.W.2d 81 (N.D. 1983) (noting that the power of the State Board of Higher Education is drawn both from the constitution and from statutes implementing the constitution); Nord v. Guy, 141 N.W. 395 (N.D. 1966) (holding a legislative delegation to the board without declaring "the policy of the law and fix[ing] the legal principals which are to control" was unconstitutional); and Posin v. State Bd. of Higher Educ., 86 N.W.2d 31 (N.D. 1957) (holding that the Board of Higher Education was authorized by a combination of a statutory and constitutional authority to discharge faculty members).

The North Dakota Supreme Court in Leadbetter, held that while the Board of Education has authority over some aspects of the colleges and universities in North Dakota, the North Dakota Constitution and statutes indicate that these colleges and universities ultimately remain under the control of the state. Id. at 433. However, the North Dakota Supreme Court has not addressed the issue as to the limits of the state's authority over North Dakota's colleges and universities.

The South Dakota Supreme Court has had occasion to address the authority of the South Dakota Legislature to legislate in an area where the South Dakota Board of Regents has traditionally considered itself immune from legislation. The South Dakota Board of Regents enabling provisions are not as explicit as the North Dakota Board of Higher Education's, however the South Dakota Board is also a constitutionally created member of the Executive Branch of the South Dakota government. South Dakota Bd. of Regents v. Meierhenry, 351 N.W.2d 450, 452 (S.D. 1984). The Board of Regents is not "ordained with an absolute right of control, free from legislative restraint" but the Legislature may do necessary things "short of erasing regent control." Id. A contrary conclusion would require the courts to ignore language in the South Dakota constitution which authorizes the board to exercise control over state educational institutions under its own authority as well as "under such rules and restrictions as the legislature shall provide." Id. Thus, in South Dakota at least, the constitutional board governing the institutions of higher education is subject to those restrictions which may be imposed by the Legislature, but which do not erase that board's control.

As noted above, North Dakota's constitution requires the Board of Higher Education to operate "within constitutional and statutory limitations." N.D. Const. art. VIII, ' 6(1) (Emphasis supplied.) The Board is not a miniature Legislature but is a part of the Executive Branch of government. Nord v. Guy, 141 N.W.2d 395, 402. To give effect to the word "statutory" in the constitution I must conclude that the Board of Higher Education is subject to limitations imposed by the Legislature. The "statutory" limits referred to in the constitution are those which are enacted by the Legislative Branch including, in appropriate cases, the people. See, State ex rel. Walker v.

Link, 232 N.W.2d 823 (N.D. 1975) (Referral of University of North Dakota appropriation declared unconstitutional because it would eliminate that institution thus violating the constitutional requirement that UND be maintained.) The Legislature's power to enact legislation which controls activities of the Board of Higher Education is somewhere between the extreme of the referral in Walker which would have eliminated the University of North Dakota and the unfettered control given the State Board of Higher Education which was held unconstitutional in Nord. Other state courts have addressed the balance of power between the Legislature and constitutional executive officers and considered the Legislature's authority and limits.

The case most closely analogous to the issue presented here is Nat'l Union of Police Officers Local 502-M AFL-CIO v. Bd. of Comm'rs for the County of Wayne, 286 N.W.2d 242 (Mich. Ct. App. 1979). In the Wayne County case, the sheriff, a constitutionally created officer, refused to reinstate a deputy in accordance with an arbitrator's award. The Michigan law required a public employer to collectively bargain with its employees. The sheriff's police powers were considered an inherit attribute of the sovereignty of the state of Michigan which the court said were nondelegable and could not be bargained away. Id. at 245. The court held that "although the sheriff's power to hire, fire, and discipline may be limited by the Legislature, which of his deputies will be delegated the powers of law enforcement entrusted to him by the constitution is a matter exclusively within his discretion and inherent in the nature of his office, and may neither be infringed upon by the Legislature nor delegated to a third party." Id. at 248. Thus, the Legislature's control could be exercised by establishing some limitations on the Sheriff's authority, but it could not choose who the sheriff would have perform the office's duties.

The Minnesota Supreme Court addressed the issue of legislative control of an executive official in terms of the legislation's impact upon "core functions." See, Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986) (holding the legislature could require an executive officer to share its functions with statutory officials but a legislative enactment transferring the duties and several positions from the constitutionally created State Treasurer's Office to the statutorily created Department of Finance was unconstitutional because it transferred the inherent or "core" functions of an executive officer to an appointed official.) In Michigan the question was presented in terms of "preventing" an executive officer from performing his duties. See Michigan Civil Rights Commission v. Clark, 212 N.W.2d 912 (Mich. 1973) (held statute authorizing removal of proceedings being held before the constitutionally created Civil Rights Commission (CRC) to a court prevented CRC from making constitutionally required decision in civil rights cases.) A statute limiting a constitutionally created PCS's authority was constitutional. See Spire v. Northwestern Bell Tele. Co., 445 N.W.2d 284, 233 Neb. 262 (Neb. 1989) (holding that a statutory restriction on the PSC's rate setting authority was constitutional because it left "PSC control over the quality of service provided by telecommunication suppliers, [intact and retained] the PSC's power to allow entry into and exit from the marketplace. . . ." Id. at 295.)

Refusal to approve a budget resulting in elimination of a division of the sheriff's office is an appropriate use of legislative powers. See Wayne County Sheriff v. Wayne County Bd. of Comm'rs, 385 N.W.2d 267 (Mich. App. 1983) (holding the budget denial appropriate because the county had properly determined elimination of the division "would not prevent [the sheriff] from performing the mandated duties of his office at a 'minimally serviceable individual level.'" Id. at 269.)

The result in each case addressing whether a constitutionally created executive officer's authority was destroyed by the Legislature's act, turned upon the particular circumstances in each case. However, in every case the Legislature's authority to regulate, prescribe, limit or define activities was recognized.

In the situation presented here, the Legislature has authorized a statutorily created entity to issue rules which would apply to classified employees of a constitutionally created board. The rules will probably be based on existing personnel policies of the Central Personnel Division Director, and will not likely interfere with the "core" functions of the Board of Higher Education, eliminate any of its constitutional functions or prevent their exercise. It is therefore my opinion the legislature acted within its authority when it enacted legislation authorizing the rules provided for by N.D.C.C. ' 54-44.3-12(1). It is my further opinion that the Central Personnel Division Director may promulgate rules concerning personnel administration which apply to classified employees of the State Board of Higher Education and the institutions of higher education. I cannot conclude at this point that rules not yet promulgated will be constitutionally acceptable. However, before any rules may become effective, they must be approved as to legality by this office. N.D.C.C. ' 28-32-02(7).

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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